KERR-McGEE COAL CORP.

IBLA 85-805 Decided March 26, 1987

` Appeal from decision of the Wyoming State Office, Bureau of Land Management, readjusting coal lease W-0313668.

Affirmed as modified and remanded.

1. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

BLM is not barred from readjusting all the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201-209 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is given prior to the end of the 20-year primary term of the lease.

2. Coal Leases and Permits: Leases -- Coal Leases and Permits: Readjustment

Where stipulations included in a readjusted coal lease do not recognize the extent to which a lessee has already conducted activities on the leased lands, those stipulations must be amended to clarify the extent to which appellant's existing operations are affected and to ensure that mere acceptance does not constitute a violation.

APPEARANCES: William E. Heimann, Esq., for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Kerr-McGee Coal Corporation (Kerr-McGee, appellant) has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated July 2, 1985, overruling in part its objections to the readjustment of its coal lease W-0313668.

BLM issued coal lease W-0313668 pursuant to the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. § 181 (1982), for lands in secs. 8, 9, 17, and 20 in

T. 50 N., R. 7 W., sixth principal meridian, Campbell County, Wyoming. 1/ The lease was issued effective October 1, 1965. By its terms, W-0313668 was subject to readjustment after a period of 20 years, i.e., October 1, 1985.

By decision dated October 24, 1984, BLM informed Kerr-McGee that the terms and conditions of W-0313668 would be readjusted. BLM gave October 1, 1985, as the effective date for the readjusted terms and conditions of the lease and provided 60 days for the lessee to file objections to the proposed readjustment. Kerr-McGee filed objections to the proposed lease terms and conditions on June 3, 1985. BLM rejected most of those objections in its July 2, 1985, decision.

Kerr-McGee appealed, claiming the readjusted terms of the lease are not reasonable under section 3(d) of the original lease. Appellant asks that BLM consider the original lease terms and proposes that the original lease terms be maintained. Appellant argues that the readjusted lease terms are ambiguous in failing to specify when rentals and royalties are due and ambiguous with respect to appellant's obligations as to delivery of premises and removal of machinery and equipment. Appellant objects to the rental increase from $1 to $3 per acre, and elimination of the right to receive credit against the first royalties accruing during the year for which the rentals were paid. Appellant suggests the lease should be amended to conform to the original lease terms. Appellant also argues it is unreasonable to revise the lease to raise the likelihood of automatic breach of lease terms by the acceptance of readjustment, citing the standards set forth at 43 CFR 3480.0-5(a)(14) and (15). Standards, imposed in the readjusted lease, pertaining to conduct of operations and damage to property or cultural resources were particularly cited as conditions which imposed danger of breach by acceptance. Appellant points out it has not yet conducted development operations on this lease. Appellant also objects to the imposition of a production royalty of 12-1/2 percent "under the guise of a statutory mandate with no analysis of the factual and economic circumstances involved."

[1] At the time of issuance of the original lease, section 7 of the MLA, 30 U.S.C. § 207 (1964), provided:

> Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine unless otherwise provided by law at the time of the expiration of such periods.

Section 7 of the MLA was amended by section 6 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 207(a) (1982), to read in pertinent part: "Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of the its primary term of

1/ After a negotiated land exchange between appellant and BLM, appellant relinquished lands in secs. 20 and 29 of this lease. The Board granted appellant's request to withdraw this appeal only as to those lands by order dated Nov. 25, 1985. Appellant also withdrew its appeal involving a companion lease, W-0312311, dismissed by order dated Nov. 18, 1985.

twenty years and at the end of each ten-year period thereafter if the lease is extended."

Section 3(d) of the original lease form specifically provides:

> The lessor expressly reserves * * *:
>
> * * * * * * * *
>
> (d) Readjustment of terms. The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

This Board has repeatedly addressed the central issues of the authority of BLM to readjust Federal coal leases and the applicability of FCLAA and its implementing regulations to pre-FCLAA leases. E.g., Coastal States Energy Co., 94 IBLA 352 (1986); Gulf Oil Corp., 91 IBLA 93, 96 (1986). In every instance, we have recognized BLM's right to readjust is preserved if a lessee is notified of the intent to readjust prior to the deadline for readjustment. The Department has consistently taken the position that the readjustment process does not have to be completed so long as a notice of intention to readjust was provided prior to the end of the then current lease term. Id. The specific provision of the readjusted lease may be submitted at a later date, even following the expiration of the term.

Notice of intent to readjust the lease at issue was given the lessee prior to the 20-year anniversary date of the base lease. That notice conformed to Departmental regulations and satisfied the minimum requirements of the law. Thus, we conclude that BLM's readjustment of appellant's lease was timely under the statutes and regulations. See Gulf Oil Corp. v. Clark, 631 F. Supp. 29, 31 (D.N.M. 1985), aff'g Gulf Oil Corp. 73 IBLA 328 (1983).

Appellant alleges adoption of certain terms without inquiry into the circumstances of the lease renders readjustment arbitrary and capricious. This Board has held that a decision by BLM to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or when such provisions are in accordance with the proper administration of the public lands. Coastal States Energy Co., 94 IBLA at 355; Gulf Oil Corp., 91 IBLA at 98-99. Where proposed terms of a readjusted lease have been mandated by statute or regulation, the Board has held BLM must include such terms in the lease. Gulf Oil Corp., 91 IBLA at 99; Consolidation Coal Co., 86 IBLA 60, 66 (1985). A lessee has no vested right to the indefinite continuation of existing lease terms, as the initial lease contains no limitation regarding contract terms subject to readjustment. To hold otherwise would negate the statutory right to readjust. Coastal States Energy Co., 94 IBLA at 355. Insofar as a coal lease readjustment is concerned, a lessee has only one existing right: the right to accept or reject the continuation of a coal lease beyond a 20-year period under such reasonable terms as the Secretary deems proper. Consolidation Coal Co., 86 IBLA at 64.

We have stated that in order for the Department to reconsider its position on the readjusted provision of a lease, an appellant must

demonstrate that a protested term or condition is not in accordance with statute, regulation, or proper administration of the public lands. Gulf Oil Corp., 91 IBLA at 98-99. In this case, many of the new terms and conditions imposed under the readjustment are required by FCLAA and the regulations promulgated pursuant to that statute. The argument that the provisions of FCLAA, enacted after issuance of the lease, may not be applied to pre-FCLAA leases has been rejected by this Board on numerous occasions. See Coastal States Energy Co., 94 IBLA at 355 and cases cited. Although lease readjustment is discretionary, if the Secretary readjusts a lease, he is obligated by law to impose certain lease terms and conditions on all pre-FCLAA leases at the time of readjustment in order to conform to the provisions of FCLAA mandated by Congress. Gulf Oil Corp., 91 IBLA at 99; Gulf Oil Corp., 73 IBLA at 331-32.

Appellant's remaining arguments focus on individual lease terms and whether the readjustment proposed by BLM is factually supported and reasonable.

FCLAA provides:

> A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12-1/2 per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations.

30 U.S.C. § 207(a) (1982). 43 CFR 3473.3-2(a)(2). Appellant objects to the proposed increase in production royalty for underground and surface mining operations. Departmental regulation 43 CFR 3451.1(a)(2) provides that "[a]ny lease subject to readjustment which contains a royalty rate less than the minimum royalty prescribed in § 3473.3-2 of this title shall be readjusted to conform to the minimum prescribed in that section." The readjusted lease imposes a royalty rate of 12-1/2 percent of the value of coal mined by surface methods. The 12-1/2 percent of the value of coal recovered by other than underground mining methods is the minimum royalty prescribed by statute, 43 U.S.C. § 207(a) (1982), and regulation 43 CFR 3473.3-2(a)(2). The readjusted lease properly reflects the statutory and regulatory surface mining requirements.

The readjusted lease provides for a royalty of 8 percent for underground operations. Section 6 of FCLAA, 30 U.S.C. § 207(a), provides that the Secretary may set a royalty for coal mined underground at less than the 12-1/2 percent mandated for coal extracted by methods other than underground mining. Departmental regulation 43 CFR 3473.3-2(a)(3) provides: "A lease shall require payment of royalty of not less than 8 percent of the value of the coal removed from an underground mine, except that the authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant." The Board has held that the minimum royalty rate which BLM may impose in a readjusted lease for coal removed by underground mining may not be less than 8 percent. Kanawha & Hocking Coal & Coke Co., 93 IBLA 179, 186 (1986). A lessee can obtain short-term royalty relief, but no less than 5 percent, when it can make the showing required under 43 CFR 3473.3-2(d).

The Court in Coastal States Energy Co. v. Watt, 629 F. Supp. 9, 32 (D. Utah 1985), upheld the 8 percent minimum for underground operations and observed as follows: "The imposition of a blanket 8 percent rate upon lease readjustment, with the possibility of a lower rate on a showing of economic hardship, reflects a careful balancing of the relevant factors." See also Blackhawk Coal Co., 68 IBLA 96, 99 (1982).

We hold that BLM acted in accordance with its authority under the FCLAA and Departmental regulations in establishing the royalty rates for this lease. See Coastal States Energy Co., 94 IBLA at 358-59; Gulf Oil Co., 91 IBLA at 102. The above holding is made notwithstanding FMC Wyoming Corp. v. Watt, 587 F. Supp. 1545 (D. Wyo. 1984), wherein the United States District Court for Wyoming held that the Department could not apply the statutorily mandated rate of 12-1/2 percent to the leases subject to readjustment in that case without consideration being given to the specific factual circumstances of each lease. Another district court, however, has expressly disagreed with the Wyoming court's opinion. Coastal States Energy Co. v. Watt, supra at 21 n14, aff'g, Coastal States Energy Co., 70 IBLA 386 (1983). Both the Wyoming and Utah district court opinions are under appeal in the United States Court of Appeals for the Tenth Circuit. Even though appellant's lease is situated in Wyoming, this circumstance does not require the Board to await the appellate court's decision. Pacificorp, 95 IBLA 16 (1986). It is the Board's practice to apply its own decisional precedent until binding contrary precedent is established. Spring Creek Coal Co., 94 IBLA 333 (1986).

Appellant also objects to the timing of the royalty payment, arguing that the lease provision should be amended from a reference to when the royalty obligation accrues to substitute when "the coal is sold" (Statement of Reasons at 22). However, the regulations at 43 CFR 3485.2 require the royalty payment to be determined according to accrual of the obligation. Such reference is not always synonymous with the sale of coal. See 43 CFR 3485.2(e).

Similarly, appellant objects to the increase in rental which may not be credited against royalties. The current regulation, 43 CFR 3473.3-1(a), sets the new rental at not less than $3 per acre. Furthermore, there is no longer authority to allow rental to be credited against royalty; FCLAA deleted the applicable authorization from the MLA. See 47 FR 33114, 33131 (July 30, 1982); 43 CFR 3473.3-1(c). The Board has considered and rejected objections to these provisions in Gulf Oil Corp., 91 IBLA at 100 and cases cited therein.

Appellant also complains that the readjusted lease is ambiguous as to when the rental payment is due. The readjusted lease at Part II section 1(a) states that rental shall be paid "annually and in advance." 2/ Thus, appellant is obligated to tender its rental payment on or before the lease anniversary date each year. We find no ambiguity in this provision.

2/ Similarly, section 2(b) of the original lease called for rental payment "annually, in advance."

Appellant argues that the new lease provisions subject the lease to future regulations which may impair the lease arrangements. This Board has previously approved the adoption of similar provisions which have subjected a readjusted lease to future regulations pertaining to coal leasing and held such provisions to be within the scope of authority delegated to the Secretary. Gulf Oil Co., 91 IBLA at 100; Consolidation Coal Co., 86 IBLA at 67. In those cases, we found that the lessees were adequately protected from unreasonable application of new or revised regulations. We also noted that any future decision adversely applying new or amended regulations may be appealed by the lessee in accordance with Departmental regulations.

[2] Appellant asserts that stipulations relating to cultural and paleontological resources do not recognize that appellant has already conducted extensive activities on the leased lands. Appellant fears that the mere acceptance of these stipulations may result in their violation. The record does not clearly indicate the extent of any surface disturbances, but the lessee would appear to be in violation of the stipulations as proposed if surface disturbance has occurred. Thus, we conclude that these stipulations must be amended in order to clarify the extent to which appellant's existing operations are affected and to ensure that mere acceptance of the lease does not constitute a violation. 3/ See Coastal States Energy Co., 94 IBLA at 362; Coastal States Energy Co., 81 IBLA 171, 178 (1984).

To the extent appellant has raised arguments which we have not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Wyoming State Office is affirmed as modified and remanded for further action consistent with this opinion.

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

John H. Kelly
Administrative Judge.

3/ Appellant has not yet shown these stipulations to be in conflict with the use of the leased lands and, in similar instances, these standard stipulations have been found to be acceptable. See Ark Land Co., 90 IBLA 43, 52 (1985). The stipulations are to be imposed upon those "areas to be disturbed." Thus, any question relating to the application of these stipulations to a particular area could be addressed at the time the lessee submits its mine or exploration plan. Id.